MAY 31 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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May 30, 1975

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Pursuant to Rule 24, paragraph 5 of the Rules of this Honorable Court, petitioner, Deaton, Inc., a corporation respectfully files this supplemental brief in order to call the Court's attention to the following new cases which give additional support to granting the writ of certiorari herein: *Lorenz Schneider Co. v. NLRB*, — F.2d —, 89 LRRM 2235, 76 LC ¶ 10,846 (2d Cir., April 30, 1975); and *Local 814, Teamsters v. NLRB*, — F.2d —, 89 LRRM 2197, 76 LC ¶ 10,828 (D. C. Cir., April 30, 1975).

Each of these cases rejects the approach of the Fifth Circuit in the case at bar, that it is none of the reviewing courts' business that the Board cases on employee v. independent contractor status of owner-drivers are in irreconcilable conflict, and that all the court should do is check the record to see if substantial evidence exists. The *Lorenz Schneider* case, reversing the Board finding of employee status, did so although expressly conceding that "We cannot say that here the Board had no basis for its conclusion"; and disapproved the tendency of some reviewing courts to inch away from the "pure agency law" test mandated by Congress in the Taft-Hartley Act by extending immunity to judicial review of Board decisions too far. In *Local 814, Teamsters,* the Court of Appeals for the District of Columbia specifically took note of the ostensible inconsistency of two Board decisions before it for review, on the employee v. independent contractor status of owner-drivers. The Fifth Circuit holds this inconsistency immaterial; to the contrary, the District of Columbia Circuit held this quite material. Two of the judges, a panel majority, remanded the cases to the Board for clarification; for an effort to distinguish the two cases and to explain why different results were reached in them. Chief Judge Bazelon, in a Concurring and Dissenting Opinion, described the Board decisions as "a maze of precedents with few standards for decision discernable", and voted against simply remanding the cases, as he considered that this would produce at best a "post hoc rationalization"; he said, "I would reverse the Board and remand for a thorough reconsideration of the doctrinal quicksand in this area." Manifestly these decisions have now produced a clear conflict among the courts of appeals on the matter of what judicial review is to be accorded to decisions of the National Labor Relations Board on this important and recurring question. Therefore another reason exists for granting the writ which did not clearly obtain when we filed our petition. Supreme Court Rule 19, paragraph 1(b). Petitioner respectfully requests that the Court consider particularly the *Local 814, Teamsters* case, *supra* as its holding is most strikingly different from

the holding below, as to what a reviewing court ought to do when faced with irreconcilable, or even ostensibly inconsistent, Board decisions.

Respectfully submitted

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Certificate of Service

I hereby certify that on this 30th day of May, 1975, a copy of the Supplemental Brief of Petitioner was mailed, properly addressed and postage prepaid, to the Honorable Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20510, Counsel for the Respondent and to the Solicitor General of the United States, Washington, D. C. 20570.

C. V. STELZENMULLER